IPOH TOWN COUNCIL & ANOR. v. NG KHOON KHOON

[C. A. (Thomson C.J., Hill and Good JJ.A.) April 11, 1960]

[Ipoh — F.M. Civil Appeal No. 4 of 1960]

Practice — Appearance — Federal Counsel — Application to appear on behalf and represent the Chairman of a Town Council — Whether Chairman a "public servant" — Test of — Government Proceedings Ordinance, 1956, s.24(1)(b) and (2)(a).

Advocates and Solicitors — Federal Counsel — Right of audience — Advocates and Solicitors Ordinance, 1947, s.55(2).

This was an application by the Federal Counsel to appear on behalf of and represent the Chairman of the Ipoh Town Council on the hearing of the appeal.

Held: as the salary of the Chairman of the Ipoh Town Council is not paid by any Government but is paid by the Ipoh Town Council, he is not therefore to be considered as a public officer who, in this case, is being sued by virtue of his office and therefore the Federal Counsel has no right of audience on his behalf under section 24(2)(a) of the Government Proceedings Ordinance, 1956.

Section 55(2) of the Advocates and Solicitors Ordinance, 1947 does not in itself confer upon the law officers any new right of audience but merely saves rights under the pre-existing law which might otherwise have been held to have been adversely affected by the provisions of the Advocates and Solicitors Ordinance. Those rights, at that time, mainly arose from the provisions of the Government Suits Enactment (Cap. 17) of the old Federated Malay States Laws.

Tests of employment discussed.

Case referred to:—

(1) *Sin Huat Hin Tin Mines Ltd.* v. *Lee Yat Kat & Ors.* [1954] M.L.J. 170.

COURT OF APPEAL, decision on Preliminary Point.

Yeoh Kian Teik for the 1st appellant.

B. K. Das (*N. Sharma* with him) for the respondent.

Thomson C.J. (delivering oral judgment on preliminary point): The second appellant in this appeal is the Chairman of the Ipoh Town Council.

We now have before us an application by Federal Counsel to appear on his behalf and represent him on the hearing of the appeal.

Before proceeding to the actual application itself, let us consider the relevant provisions of the law. I start with Chapter 17 of the old laws of the Federated Malay States. Section 15 gave the Legal Adviser, as he then was, certain rights of audience. That Enactment was still in force when the Advocates and Solicitors Ordinance, 1947, was enacted. That Ordinance gave extensive, and indeed almost exclusive, rights of audience to legal practitioners admitted to practise in accordance with its terms but it dealt with the rights of audience of Government law officers in section 55(2) which provides that:

"nothing herein shall affect the right (which is hereby declared) of the Attorney-General and ....Federal Counsel to appear and to plead and do all other things necessary in respect of litigation or proceedings in any Court in the Malayan Union".

The effect of that sub-section was considered by Wilson J., in the case of *Sin Huat Hin Tin Mines Ltd.* v. *Lee Yat Kat & Ors.*[1] in which he held that it availed to enable Federal Counsel to enter appearance in certain proceedings on behalf of two officials of the Mines Department who were sued in their official capacity.

We see nothing to quarrel with in that decision of Mr. Justice Wilson. To our mind, however, there is nothing in it inconsistent with our own view that section 55(2) of the Advocates and Solicitors Ordinance does not in itself confer upon the law officers any new right of audience but merely saves rights under the pre-existing law which might otherwise have been held to have been adversely affected by the provisions of the Advocates and Solicitors Ordinance. Those rights, at that time, mainly arose from the provisions of Chapter 17 of the old Federated Malay States Laws.

Chapter 17 has now been repealed and replaced by the Government Proceedings Ordinance, 1956, and I think it is conceded that if Federal Counsel has any right of audience by reason of the provisions of that Ordinance it must arise either under section 24(1)(b) or under section 24(2)(a).

Section 24(1)(b) provides that in civil proceedings by or against the Government of a State a law officer may appear as advocate. There the short answer is that the present proceedings are not civil proceedings against the Government of a State; they are civil proceedings in the first place against the Ipoh Town Council which is not a State or a Government of a State and in the second place against the Chairman of that body who admittedly, as I have observed, is neither a State nor a Government of a State.

There only remains sections 24(2)(a), the material portions of which read as follows:—

"In civil proceedings to which a public officer is a party —

(a) by virtue of his office;

..... a legal officer may appear as advocate on behalf of such officer .....".

The expression "officer" is defined in the Ordinance itself. There is a similar definition of "public officer" contained in the Interpretation and General Clauses Ordinance. From both these definitions it is abundantly clear that an officer is a person employed by a Government, either the Federal Government or a State Government. In the present case, therefore, the question of Federal Counsel's right of audience narrows itself down to the question: is the Chairman of the Ipoh Town Council a public officer within the meaning of section 24? And that in its turn boils down to the question: is he employed by any Government?

The tests of employment are, of course, various. A common one is the test which is used to distinguish between a servant and a contractor, that is to say whether the master can direct not only what the servant does but

also his way of doing so. In the case of a quasi-judicial functionary such as the Chairman of a statutory body such a test is clearly irrelevant.

In our view the only practicable test here is the test of payment. It has been conceded that this functionary's salary while he is actually functioning as such is not paid by any Government but is paid by the Town Council. That compels us to the conclusions that he is not in the present proceedings and for the purpose of the present proceedings to be considered a public officer who is being sued by virtue of his office and that therefore, Federal Counsel has no right of audience.

Hill and **Good JJ.A.** concurred.

Application dismissed.

Solicitors: *Gibb & Co.; N. Sharma.*

THEAN CHEW v. THE SEAPORT (SELANGOR) RUBBER ESTATE LTD.

[O. C. J. (Ong J.) April 21, 1960]

[K. L. — Civil Suit No. 27 of 1957]

Negligence — Nuisance — Tree — Rubber tree adjoining highway — Fall on passing lorry causing injury to deceased — Fall due to disease — Liability of occupier of land — Civil Law Ordinance, 1956, s.7(8).

Evidence — Estate management — Established standard and practice — Standard of good estate management not necessarily that of reasonable and prudent owner.

The defendants are a company, and they have employed a person competent and experienced in the management of rubber estates as their manager. A diseased rubber tree which stood on the defendants' estate immediately adjoining the highway, fell on the lorry in which the plaintiff's husband was travelling and caused injuries from which he died. In this action the plaintiff claimed damages on behalf of herself and five infant children of the marriage, on the ground of the defendants' negligence, and alternatively, nuisance. The tree was old, about 50 feet in height, excluding the crown, and it stood 33 feet from the nearest edge of the highway, so that persons on the highway are liable to suffer injury if the tree fell across it. The tree suffered from the disease called *ustulina zonata*. On the evidence it was found as a fact that it was the disease affecting the laterals that was the cause of the tree falling, and that, but for such disease, the tree would not have fallen.

The defendants contended that their manager in fact did all that was reasonably required of a reasonable and prudent land owner; that he kept the tree under frequent regular observation and thereby satisfied himself that the tree was in no danger of falling; that this opinion was shared by the three experts whose evidence was before the Court; that the condition of the foliage sufficiently showed the tree to be healthy; and lastly, that in law the defendants were not in the position of insurers.

Held: (1) on the facts, the estate manager had failed to take even the most elementary precautions to prevent danger to persons on the highway in case the tree should fall; this failure, in view of the obviously diseased condition of the tree, amounted to taking an unjustifiable risk. The danger of the tree in that condition falling was reasonably foreseeable and the damage to persons on the highway such that it was, or should reasonably have been, within the contemplation of every prudent land owner. A case of negligence had been established, and therefore the plaintiff was entitled to judgment.

(2) the plaintiff was also entitled to judgment on the alternative ground of nuisance because the defendants omitted to remedy the nuisance constituted by the state of their property when it arose within a reasonable time after they did or ought to have become aware of it.

Per curiam: "Established standard practice (in estate management) may well be the practice of reasonable and prudent estate owners. It may, on the other hand, fall below or even surpass, the standard required by law of a reasonable and prudent owner, which is the test that the law requires to be applied. Evidence of standard practice cannot, however, be substituted for the judgment of the Court or relieve it of the duty of deciding on the evidence whether the defendants' manager has properly discharged the duty of care that he owes to passers-by on the highway."

Cases referred to:—

(1) *Brown* v. *Harrison*, 177 L.T.R. 281, 282.

(2) *Caminer* v. *Northern & London Investment Trust Ltd.* [1950] 2 All E.R. 486, H.L.

(3) *Caminer's* case [1948] 2 All E.R. 1101, 1103.

(4) *Caminer's* case [1949] 2 All E.R. 486, 491, C.A.

(5) *Noble* v. *Harrison* [1926] 2 K.B. 332, 338.

ACTION for Damages.

Miss P. G. Lim for the plaintiff.

M. Edgar for the defendants.

Cur. Adv. Vult.

Ong J.: On February 4, 1956 the plaintiff's husband was travelling in a lorry along the highway between Kuala Lumpur and Klang when a diseased rubber tree, standing on the defendants' estate immediately adjoining the highway, fell on the lorry and caused the injuries from which he died. The plaintiff has brought this action under the provisions of section 7(8) of the Civil Law Ordinance, 1956, claiming damages on behalf of herself and the five infant children of the marriage, on the ground of the defendants' negligence, and, alternatively, nuisance.

The defendants employed a resident manager, Mr. N. R. Tubbs, on the estate who had been there since eight months prior to the accident, and who holds a college diploma in agriculture.

The tree was old for a rubber tree, about 50 feet in height, excluding the crown, and it stood 33 feet from the nearest edge of the highway, which is 18 to 20 feet wide, so that persons on the highway are liable to suffer injury if the tree fell across it. Its base circumference was about 4 feet. It suffered from the disease called *ustulina zonata* described by Arnold Sharples, an authority on the subject, in his book "*Diseases and Pests of the Rubber Tree*", thus:

> The disease is usually discovered on old trees as a "collar rot". On one of the stem a hollow at the base may be formed due to the rotting tissue disintegrating under the influence of the weather and falling away. If a cut is made below the surface at such a point, it will be found that the rotting tissue has spread to a distance of three to four feet above ground. It is seldom that the fungus gains a greater height than this, for by this time most of the tissues at the base of the stem will have become involved, with a consequent restriction in the amount of water supplied from the roots . . . . If an attacked root system is examined, it will be found that the tap-root and some of the larger laterals are involved, and as a result water conduction